United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

76-4267

United States Court of Appeals

FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION,

Petitioner,

—against—

JUDITH ANN WEBER,

Respondent.

ON PETITION TO REVIEW ORDER OF BENEFITS REVIEW BOARD, UNITED STATES DEPARTMENT OF LABOR, BRB NO. 76-129

PETITIONER'S BRIEF

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Issue

Does substantial evidence on the whole record support the administrative finding that death arose out of and in the course of employment?

Statement

Petitioner seeks to reverse Benefits Review Board affirmance, 5 BRBS (11a-15a) of an Administrative Law Judge decision, 3 BRBS (1a-10a) awarding compensation under the Longshoremen's & Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. 901, et seq., as extended by the Defense Base Act, 42 U.S.C. 1651, et seq., on a claim that "stressful employment environment" precipitated fatal myocardial infarction (5a), the issue being whether death

"[arose] out of and in the course of employment" as required by § 2(2) of the Act, 33 U.S.C. 902(2).

Decedent, a 37 year old rigger (2a) who lived in N. Stonington, Conn. (35a), 12 miles from petitioner's Groton, Conn. yard, where he had worked for several years on the 11:30 P.M.–7:30 A.M. Monday night–Saturday morning shift (19a), suddenly and unexpectedly died (2a) in his room at the best hotel in Dunoon, Scotland (58a) on September 15, 1974, his Sunday off (4a) when he was not subject to work call (34a), at the end of the first of 6 weeks voluntary assignment to help refit a submarine in Holy Loch (2a, 41a). Decedent had flown from New York to Scotland the previous Sunday (3a) and during the week worked the 4:00 P.M.–2:30 A.M. Monday afternoon–Sunday morning shift which, portal to portal his hotel, was about 11½ hours each shift (3a-4a). Daytime temperature was about 40°F, cooler at night, and it was rainy and windy (3a), as it frequently is in Connecticut. Decedent did the same rigging work he had done at the Groton yard (25a), inside and outside (29a), his clothes got wet, he had a cold, the job was strenuous, and he appeared to be exhausted at the end of his shift (4a).

Decedent had a medical history of high blood pressure, possible borderline diabetes, and hereditary risk of heart disease (2a). He was sorrowed by a friend's death a month before going to Scotland, and was apprehensive about the forthcoming trip since he had never flown before or been separated from his family (2a). A flat tire delayed the ride to the New York airport (3a), the flight was "a little scary" to decedent (55a), there was some initial check cashing problem, and decedent, who was wont to cry when unhappy (3a, 49a), cried during a telephone conversation with his wife after he arrived (3a). During a later conversation

and in a letter to his wife (56a-57a), decedent said he was adjusting and he sounded better, although a bit hoarse (3a). The Sunday he died, decedent awoke about 9:30 A.M., had breakfast, spent the next several hours leisurely with a friendly co-worker, wrote a newsy letter with minimal complaints to his wife (58a-59a), and expired at 3:10 P.M. after dinner (4a, 50a-51a, 60a-61a).

The medical evidence consisted of letters from the attending physician and petitioner's expert stating that decedent's death was not job-related (4a, 5a), and a letter to claimant's attorney from a Dr. Spitz expressing general beliefs, which the Administrative Law Judge ("ALJ") called "rather meaningless" (43a), that unusual situations may cause stress which, combined with risk factors such as high blood pressure and diabetes, can precipitate myocardial injury (54a). The ALJ found "that decedent's uprooting induced severe anxieties that were compounded by the generally unfavorable work environment and served to trigger his underlying coronary artery disease into fatal manifestation" (7a). Despite the paucity of medical evidence of causation, the ALJ found "substantial evidence" of "devastating stress" "which Dr. Spitz indicated can produce myocardial infarction particularly in one possessing decedent's risk factors. The inference is inescapable to me that the decedent's working environment precipitated his death" (9a).

The ALJ awarded weekly compensation payments until otherwise ordered (9a). The Benefits Review Board affirmed on the ground that the ALJ was entitled to base his finding "of a causal relationship between the death and decedent's employment" (14a) on Dr. Spitz' inference "that a person with the risk factors of the decedent could have a myocardial infarction when placed under stress" (14a).

Argument

Corollaries to "substantial evidence on the record considered as a whole" review, *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504, 508 (1951); *Potenza* v. *United Terminals, Inc.*, 524 F. 2d 1136, 1137 (2 Cir. 1975), are "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. * * * If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *Securities Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196-197 (1947); *N.L.R.B.* v. *Columbia University*, 541 F. 2d 922, 930 (2 Cir. 1976).

Do the ALJ's various statements that:

> "'risk incidental to the location where the employment requires him to be' * * * includes any exposure to harm arising from the work environment including emotional and physical stress" (7a)

> "decedent's uprooting induced severe anxieties that were compounded by the generally unfavorable work environment" (7a)

> "decedent was under devastating stress * * * which Dr. Spitz indicated can produce myocardial infarction

> • • • The inference is inescapable to me that decedent's working environment precipitated his death" (9a)

constitute a finding that decedent's working environment caused fatal emotional stress, or fatal physical stress, or fatally combined emotional and physical stress? The first quotation—"emotional and physical stress", denotes a fatal combination. The second quotation—"anxieties that were compounded", indicates emotional, only. The third quotation—by reference to Dr. Spitz' letter, intimates whichever possibility the ALJ thought the Dr. meant, and the Board's affirmance by similar reference perpetuates the ambiguity.

There is no substantial evidence that physical stress, either alone or in combination, may or conceivably could have precipitated decedent's fatal infarction at McColl's Hotel on his day off. Why the ALJ mentioned that decedent was upset by a friend's death and the forthcoming trip (2a) is unclear, but the ALJ presumably did not misconceive that those off-the-job emotional stresses arose out of and in the course of decedent's employment. Although decedent may imaginatively have been under "devastating" emotional stress en route to and when he first arrived in Scotland, there is no substantial evidence that he was under any stress at McColl's the day he died—indeed, all the evidence is to the contrary (50a-51a, 58a-61a), nor is there any evidence that emotional stress on Monday or Tuesday or Saturday can precipitate a myocardial infarction on Sunday.

Although the ALJ's unsubstantiated rationale is obscure, his error is manifest. Mistakenly believing that the Act's § 20(a), 33 U.S.C. 20(a), presumption entitled him

to fill the evidentiary void, he straw-grasped at everything which an uninformed layman might suspect as a precipitant of myocardial infarction—physical and emotional, ordinary and novel, job-related and not, and amalgamated them as speculative "working environment" causation. Despite the ALJ's disbelief, petitioner's medical evidence negated the § 20(a) presumption, *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935), and "mere disbelief of testimony of itself establishes nothing", *N.L.R.B.* v. *Joseph Antell, Inc.*, 358 F. 2d 880, 883 (1 Cir. 1966). "Speculation cannot supply the place of proof", *Moore* v. *Chesapeake & O.R. Co.*, 340 U.S. 573, 578 (1951), and even the most noted advocate of workmen's compensation acknowledges that:

> "When the actual heart attack occurs outside of working hours, or otherwise at some distance in time from the exertion to which it is attributed, the burden of proving a connection between the work exertion and the attack and of negating 'normal progression of the disease' is in the nature of things heavier. * [and] * increases the importance of expert medical testimony * * *." 1A Larson's Workmen's Compensation Law (1973), § 38.83, pp. 199-200.

Death is not compensable merely because it occurs at a Defense Base Act situs; death must also arise out of and in the course of employment at the situs. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504 (1951); *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965). The ALJ made no incredible finding that Dunoon, 25 miles west of Glasgow, is a "zone of special danger", cf. *O'Keeffe* v. *Smith Associates*, supra, 380 U.S., p. 364, or that decedent died in any such zone or by reason of such special danger, cf., *Wolff* v. *Britton*, 328 F. 2d 181, 185 (D.C. Cir. 1964).

The ALJ's award is not supported by substantial evidence; i.e., "the kind of evidence a reasonable mind might accept as adequate to support a conclusion", *John W. McGrath Corp.* v. *Hughes,* 264 F. 2d 314, 316 (2 Cir. 1959), cert. den. 360 U.S. 931 (1959), because without a lucid medical opinion of job-related causation, a reasonable mind could not rationally fill the gap.

Conclusion

The Board's decision should be reversed and the claim remanded for further ALJ hearing.

Respectfully submitted,

MURPHY & BEANE
BURLINGHAM UNDERWOOD & LORD
Attorneys for Petitioner

WILLIAM M. KIMBALL
EDWARD J. MURPHY
of Counsel

February 9, 1977

76-1267

SIR :

Please take notice that the within

will be presented for settlement and signature at the office of the Clerk of this Court at

on the day of
19 , at o'clock M.
Dated 19

BURLINGHAM UNDERWOOD & LORD
for

One Battery Park Plaza
New York, N. Y. 10004

To

for

SIR :

Please take notice that the within is a copy of
this day duly filed and entered herein in the office of the Clerk of this Court.
Dated 19

BURLINGHAM UNDERWOOD & LORD
for

One Battery Park Plaza
New York, N. Y. 10004

To

for

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GENERAL DYNAMICS CORPORATION,

Petitioner,

- against -

JUDITH ANN WEBER,

Respondent.

F.R.App.P. 26(d)
Certificate of Service

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Of Counsel for **Petitioner**

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422-7585

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- X

GENERAL DYNAMICS CORPORATION, :

Petitioner, : 76-~~1267~~ 4267

:

- against - : F.R.App.P. 25(d) Certificate of Service

:

JUDITH ANN WEBER, :

Respondent. :

- X

I certify that on February 8, 1977, I caused 2 copies of the separately printed appendix and 3 copies of petitioner's brief to be served by first class mail on respondent's attorney of record herein, addressed as follows:

Matthew Shafner, Esq.
Messrs. O'Brien, Shafner, Garvey,
Bartinik & Stuart
Bridge Street at Route One
P.O. Drawer 929
Groton, Connecticut 06340

I also certify that although the Director, Office of Workers' Compensation Programs, U.S. Department of Labor, is not a proper party in proceedings before this Court, cf., Pittston Stevedoring Corp. v. Delleventura, 544 F. 2d 35, 42-43, fn. 5 (2 Cir. 1976), on February 8, 1977, as a matter of courtesy, I caused 1 copy of the separately printed appendix and 2 copies of petitioner's brief to be served by first class mail on the Director's designated attorney, addressed as follows:

Ronald E. Meisberg, Esq.
Office of the Solicitor
U.S. Department of Labor
Suite N2716
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Washington, D.C. 20210

New York, New York

February 8, 1977

William M. Kimball
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New York, N.Y. 10004

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) s.s.:

, being duly sworn, deposes and says that he is a clerk in the office of Burlingham Underwood & Lord, for herein; that on the day of , 19 , he served the within by mailing a true copy thereof, securely enclosed in a postpaid wrapper, in the post-office box regularly maintained by the United States Government at One Battery Park Plaza in said County of New York, to each of the following:

The address of each of the above is the address designated by each of them for that purpose upon preceding papers in this action, or the place where each then kept an office.

Sworn to before me this
day of , 19 .

.....

.....